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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re EMMA C., a Person Coming
Under the Juvenile Court Law.

B321154

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. 21CCJP03140)

Plaintiff and Respondent,

v.

JENNIFER W.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of
Los Angeles County, Nichelle L. Blackwell, Commissioner.
Remanded with direction.

Marissa Coffey, under appointment by the Court of Appeal,
for Defendant and Appellant.

Dawyn R. Harrison, County Counsel, Kim Nemoy,
Assistant County Counsel, and Stephen Watson, Deputy County
Counsel for Plaintiff and Respondent.

Jennifer W. (mother) appeals from a dispositional order establishing a legal guardianship over her child under Welfare and Institutions Code¹ section 360, subdivision (a)(1). Mother contends that the court exceeded its authority because she neither consented to the guardianship nor waived reunification services, requirements of such a guardianship. Alternatively, mother contends that the court abused its discretion in ordering visitation without sufficient detail and that the Los Angeles County Department of Children and Family Services (DCFS) conducted an inadequate inquiry into the child's possible Indian ancestry under the Indian Child Welfare Act (ICWA) and related state law. We agree that remand is required so that the court, if it continues to order visitation, can issue a visitation order specifying frequency and duration of visits. And because we are remanding so that the court can address the visitation order, we also direct the court to conduct a further ICWA inquiry.

BACKGROUND

The family consists of mother, Julio C. (father), and their daughter Emma (born January 2020). Father was nonoffending and incarcerated or living out of the country during the dependency proceedings, and is not a party to this appeal.

¹ All further undesignated statutory references are to the Welfare and Institutions Code.

I. Detention and petition

In June 2021, DCFS received a report that mother had a history of drug abuse and was pouring hydrogen peroxide into Emma's ear. Mother also had two older children over whom she did not have custody. That is, in 2012, a section 300 petition was sustained as to Emma's half sibling, Samantha L., based on mother and Samantha's father's history of violent physical altercations and drug abuse. Mother's reunification services as to Samantha were terminated in December 2014, and Samantha's father was given sole custody. Thereafter, in 2019, mother lost custody of another half sibling.

In July 2021, DCFS filed a petition alleging that mother failed to protect Emma from mother's history of substance abuse, which included abuse of alcohol, marijuana, methamphetamine, oxycodone, and Xanax. Further, Emma's older sibling Samantha was a former juvenile court dependent. (§ 300, subd. (b); count b-1.) Mother also repeatedly put hydrogen peroxide in Emma's ear, endangering her health. (§ 300, subd. (b); count b-2.)

The court held a detention hearing on July 9, 2021. Mother was present. Three days before the hearing, mother tested positive for amphetamine and methamphetamine. Mother did not show for a scheduled visit and Emma's caregiver, a paternal aunt, reported that mother was threatening the paternal aunt. At the hearing, mother denied having Indian ancestry and filed an ICWA-020 form denying Indian ancestry. She was unsure whether father had such ancestry but had never been told he did. Father thereafter submitted an ICWA-020 form denying Indian ancestry. The court found that ICWA did not apply. The court detained Emma from parents, ordered family reunification services for them and monitored visits for mother, and ordered

mother to participate in a substance abuse rehabilitation program, weekly drug testing, a parenting class, and individual counseling.

II. Adjudication report and adjudication

The adjudication hearing was scheduled for September 2021. In its report for that hearing, DCFS recommended bypassing reunification services for mother under section 361.5, subdivision (b)(10), which provides that reunification services need not be ordered for a parent whose reunification services were terminated as to another child, and the parent has not made reasonable efforts to address the problems leading to termination of services. DCFS reported that Emma was placed with paternal grandmother and was well cared for.

DCFS spoke to paternal grandmother, who had heard “something about” mother being on drugs but had never seen her do drugs.

Paternal great aunt reported that mother used to leave Emma with her for months and then show up and take Emma. Paternal great aunt no longer wanted to care for Emma because of mother’s belligerent behavior. Paternal great aunt had never seen mother drunk or do drugs but thought she might use drugs because mother “wasn’t in her right mind” one day. Paternal great aunt told mother not to put hydrogen peroxide in Emma’s ear.

Maternal grandmother said that mother had a drug problem. Last year, mother came to her house at 2:00 or 3:00 a.m. and tried to take Emma. The next day, mother’s ex-husband told maternal grandmother that he had taken mother to the emergency room because she was on drugs. Although he

knew it was not marijuana, he did not know what drug she had taken.

Mother's ex-husband reported to the social worker that mother would call him from different numbers and send "incriminating" texts. He had custody of his and mother's child since the child was an infant because mother had tried to kill them. He described mother as erratic and aggressive.

The social worker spoke to mother, who was unhoused, staying with friends or in hotels. Mother had been arrested for possessing a controlled substance in August 2020. She denied having a current substance abuse problem, but admitted using methamphetamine in March 2021 and taking pills for a disability, although she did not know what kind of pills. Mother said any drug problem was in the past, her March relapse was a "onetime thing," and the allegations were brought by people who were harassing her. Mother admitted putting hydrogen peroxide in Emma's ears without consulting a pediatrician, saying it was "common sense" because "buildup" in the ear caused autism. Mother did not show for a drug test on July 14, 2021, and although she tested negative for drugs on August 13, 2021, her results were diluted. DCFS unsuccessfully tried to contact mother about her results. Mother said she wanted her daughter back, but she also did not desire a relationship " 'right now' " and wanted to do the programs to get Emma back.

The social worker spoke to father, who was incarcerated. He denied knowing about mother's drug use.

Mother did not appear at the September 2, 2021 adjudication hearing but was represented by counsel. The court sustained the petition's allegations, stating mother clearly had a substance abuse problem and was engaging in behavior harmful

to Emma. The court noted that mother was subject to the bypass provision of section 361.5 because her reunification services had been terminated as to a sibling. However, the court granted a continuance as to disposition so that DCFS could submit information showing a basis for denying reunification services and to assess release to father's care.

III. Additional proceedings

The disposition hearing was originally set for October 4, 2021, but it was continued multiple times and ultimately not held until February and March 2022.

Meanwhile, as of October 1, 2021, father had been detained by United States Immigration and Customs Enforcement. Mother had not enrolled in any programs despite being given referrals. She tested negative for drugs on September 3, 2021. Mother visited Emma inconsistently and failed to confirm visits in a timely manner.

At the disposition hearing on October 4, 2021, the court ordered DCFS to assess father for placement. Mother was at the hearing, and the court ordered her to return on December 13, 2021 without further notice.

Thereafter, father was deported to Mexico, and he reported that he would be unable to return to California for two or three years. He wanted paternal grandmother to care for Emma.

At a continued disposition hearing on December 13, 2021, mother did not appear but was represented by counsel. At counsel's request, the court continued the hearing again to get an update on mother's progress and any change in DCFS's recommendation to bypass reunification services.

Thereafter, mother began participating in an on-line drug program, but DCFS informed her that she needed to attend an

in-person program. But as of January 18, 2022, mother had not provided additional information and had failed to show for 14 drug tests that had been scheduled from October 1 to December 27, 2021. Mother continued to visit Emma inconsistently, failing to show for five visits. On January 18, 2022, mother told paternal grandmother she would not be able to visit Emma because she did not have a phone to confirm visits. Around this same time, mother called the social worker to report she was in Mexico with father.

At the January 19, 2022 continued disposition hearing, mother was not present, and her counsel waived her appearance. The court continued the hearing so that DCFS could explore legal guardianship with paternal grandmother. The court ordered counsel for parents to give notice to their clients.

DCFS tried on January 27 and 28, 2022 to call mother, but the calls were rejected. Father told DCFS that he wanted paternal grandmother to be Emma's legal guardian. He admitted that mother had stayed with him for two days, but she left, and he did not know her whereabouts.

IV. The disposition hearings

The contested disposition hearing was finally held on February 2, 2022. Mother had told her counsel that she wanted to appear personally, but counsel had "no indication that she showed up" and had no direction from her. The court refused counsel's request to continue the hearing again, because mother had only appeared at the detention hearing and by phone on October 4, 2021 and had failed to show up for any other hearing despite being ordered to do so.

DCFS, father, and minor's counsel agreed with the recommendation to grant paternal grandmother legal

guardianship and to order no reunification services. However, mother's counsel represented that mother stated her opposition to such a disposition when he had spoken to her the day before.

The court then proceeded to outline the history of the dependency proceedings, noting that through the continued disposition hearings, "it has been shown that the mother was [un]interested in participating in services," as she had not enrolled in a rehabilitation program, had not drug tested, and presented no evidence of her willingness to address her substance abuse problem. Moreover, DCFS had recently been unable to contact mother. Thus, based on mother's unknown whereabouts, her failure to address her substance abuse, and her failure to contact DCFS, the court found the case was ready for disposition.

Citing *In re L.A.* (2009) 180 Cal.App.4th 413, the court found it could order a legal guardianship where the custodial parent agreed to it and the noncustodial parent could not be found or was disinclined to involve herself in the dependency proceedings. The court found this case to be similar because mother had lost contact with the social worker and was not visiting Emma. The court found that mother had failed to demonstrate it was in the child's best interests to grant reunification services. Accordingly, the court said mother would be bypassed for such services under section 361.5, subdivision (b)(10). The court removed Emma from her parents and appointed paternal grandmother as Emma's legal guardian with father's written consent and waiver of rights. Further, the court ordered monitored visitations for parents six hours per week, with visits to be monitored by the legal guardian or her designee. The court concluded by noting mother's objection, "but, in any

event, the mother would have been bypassed and would not have gotten [family reunification] services anyway.”

The minute order of the hearing stated that family reunification services “are granted or denied as set forth” in the incorporated court ordered case plan, but a case plan was not attached. By an order nunc pro tunc issued March 7, 2022, the court corrected its February 2, 2022 minute order to replace the reference to reunification services with, “No Family Reunification Services are ordered for Mother pursuant to WIC 361.5(b)(10).”

Because legal guardianship papers needed to be completed, the court set a hearing for March 2, 2022. On that day, the court noted that it had not completed its disposition orders, so it was viewing the hearing as a continued contested disposition.

Mother’s counsel renewed all prior objections to legal guardianship, which the court overruled. However, DCFS asked for a continuance so that it could visit Emma before closing the matter. The court granted the continuance.

At the continued hearing on March 16, 2022,² minor’s counsel informed the court that mother had sent texts to paternal grandmother threatening to kidnap Emma and saying that she was in a cartel that would deal with paternal grandmother and father. Minor’s counsel also had a photograph of father, who had been beaten. Minor’s counsel and DCFS therefore asked for another continuance to obtain evidence of the threats and seek a restraining order protecting the paternal grandmother. Mother was not present, but her counsel again objected to having a

² Maternal grandmother was at the hearing and said that mother had told her to go to it.

section “360(a) guardianship without a waiver or the [361.5] bypass process being followed.”

At the continued hearing on May 16, 2022, mother was again not present. Her counsel said mother had texted to inform him she could not be there because of a criminal matter. Counsel also renewed the objection to the legal guardianship without mother’s waiver. The court repeated that mother was an “AWOL parent who cannot thwart the best plan for this child by simply not approving and not being involved.” The court therefore removed Emma from parents, appointed paternal grandmother guardian, accepted the executed letters of guardianship, signed the JV-320 legal guardianship form, and ordered monitored visits for six hours a week, monitor to be approved by paternal grandmother.

DISCUSSION

I. Legal guardianship

Mother contends that the court could not establish a legal guardianship under section 360, subdivision (a)(1), absent her consent to the legal guardianship and waiver of reunification services. She also contends she was not given notice of the legal guardianship hearing. DCFS counters that mother’s waiver was unnecessary because she fell under section 361.5, subdivision (b)(10)’s bypass provision and, moreover, she was given notice of the legal guardianship hearing. As we now explain, we find that any error in ordering a legal guardianship under section 360, subdivision (a)(1), was harmless.

A. The juvenile court erred by ordering a legal guardianship under section 360, subdivision (a)(1)

Section 360, subdivision (a)(1), provides, notwithstanding any other provision of law, that if a court finds a child is a person described by section 300, and the parent has advised the court in writing that the parent is not interested in family reunification services, the court may, “in addition to or in lieu of adjudicating the child a dependent child of the court, order a legal guardianship, appoint a legal guardian, and issue letters of guardianship, if the court determines that a guardianship is in the best interest of the child, provided the parent and the child agree to the guardianship.” Section 360, subdivision (a)(1), is an “‘alternative procedure for appointing a guardian when the parent acknowledges early in the dependency proceedings that he or she cannot, and will not be able to, even after family reunification services, provide adequate care for the child.’” (*In re L.A.*, *supra*, 180 Cal.App.4th at p. 425.) Section 360 is a “parent-driven statute” contingent upon parental consent. (*In re Summer H.* (2006) 139 Cal.App.4th 1315, 1321.)

Here, father consented to the legal guardianship, but mother neither consented to it nor waived reunification services. Therefore, section 360, subdivision (a)(1), does not apply on its face.

Nonetheless, the court found it could order a legal guardianship under section 360, subdivision (a)(1), even in the absence of mother’s waiver of reunification services and consent to the legal guardianship, under *In re L.A.*, *supra*, 180 Cal.App.4th 413. In that case, custodial parent father consented to legal guardianship and waived reunification services. Noncustodial parent mother had notice of the dependency proceedings but never appeared. (*Id.* at p. 423.) The juvenile court found it could not order a legal guardianship in the

absence of the mother's waiver. The appellate court disagreed, finding that where a custodial parent waives reunification services, a court can proceed with a guardianship without the noncustodial parent's appearance or express waiver, so long as the noncustodial parent has been properly noticed. (*Id.* at p. 427.) "To interpret section 360, subdivision (a) to require the noncustodial parent to expressly waive reunification services, even in situations where that parent is aware of but declines to participate in proceedings that would determine the placement of the child, would be unreasonable and contrary to the legislative scheme governing dependency proceedings." (*Ibid.*)

We do not agree that *In re L.A.* controls here. Unlike the noncustodial mother in that case, mother here was a *custodial* parent, and therefore her waiver of reunification services was a prerequisite to the legal guardianship. In its respondent's brief on appeal, DCFS makes no argument that mother was a noncustodial parent or why the court's reliance on *In re L.A.* was proper.

And although the court below also suggested that *In re L.A.* was relevant because mother was uninterested in the proceedings and her whereabouts were unknown, the record does not clearly bear that out. Mother did attend the detention hearing and the October 4, 2021 disposition hearing. Although mother failed to appear for the continued disposition hearings despite being ordered to do so, she was in contact with her counsel, who appeared and objected to the legal guardianship. Accordingly, the juvenile court erred in ordering a legal guardianship under section 360, subdivision (a)(1).

B. *The juvenile court's error was harmless*

DCFS argues that any error in ordering a legal guardianship under section 360, subdivision (a)(1), was harmless because the same result would have occurred in the absence of the error. In juvenile court proceedings, harmless error analysis applies even where the error is of constitutional dimension. (*In re J.P.* (2017) 15 Cal.App.5th 789, 798.) “[P]articuliarized analysis is critical,” and should include the effect of any error on the child’s best interests, notwithstanding that a parent’s interests in her child are ranked among the most basic of civil rights. (*Id.* at p. 799.)

When a dependent child is removed from a parent’s custody, parents generally must receive reunification services. (§ 361.5, subd. (a).) The aim of reunification services is to “‘eliminate the conditions leading to loss of custody and facilitate reunification of parent and child.’” (*In re I.A.* (2019) 40 Cal.App.5th 19, 23.) Section 361.5, however, contains bypass provisions that allow courts to deny reunification services and fast-track a child’s permanent placement. (*Jennifer S. v. Superior Court* (2017) 15 Cal.App.5th 1113, 1121; see also *In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478.) Reunification services thus may be bypassed if the court finds, by clear and convincing evidence, that a court terminated reunification services for any half sibling because the parent failed to reunify with the half sibling after removal, and the parent has not subsequently made a reasonable effort to treat the problems that led to the half sibling’s removal from the parent. (§ 361.5, subd. (b)(10)(A).) Once reunification services are terminated, a juvenile court may order at a permanency planning hearing a legal guardianship with a relative. (§ 366.26, subd. (b)(3).)

The court here found that the bypass provision in section 361.5, subdivision (b)(10), applied because mother's reunification services had previously been terminated as to Emma's half sibling, and mother had not made reasonable efforts to treat her substance abuse that led to that removal. At no point during the proceedings below did mother or her counsel argue that the bypass provision did not apply. Rather, it is undisputed that mother's reunification services were terminated in 2014 as to Emma's half sibling, in part because of mother's substance abuse. Further, substantial evidence in this record shows that years later, in 2021, mother was continuing to abuse drugs. Emma came to the juvenile court's attention because of it; mother was arrested for possessing a controlled substance in August 2020; mother tested positive for methamphetamine and amphetamine just days before Emma's detention hearing in July 2021; mother admitted abusing drugs but minimized her behavior; mother failed to show for numerous drug tests; and one of mother's drug tests was negative but the sample was diluted, suggesting that mother was trying to evade detection of drugs (see *In re Natalie A.* (2015) 243 Cal.App.4th 178, 186 [diluted urine sample is "effectively inconclusive"]). Moreover, mother's failure to attend a court-ordered substance abuse rehabilitation program underscored that she was making no reasonable effort to address her substance abuse problem.

Mother responds that the error was prejudicial because she had two clean drug tests, and her counsel could have gathered evidence of her reasonable efforts to treat her substance abuse problems. It is unclear, however, to which drug tests mother is referring. She did test negative on August 13 and September 3, 2021, but as we have said, the August test was diluted, so those

results are inconclusive. (*In re Natalie A.*, *supra*, 243 Cal.App.4th at p. 186.) In any event, even assuming mother had two clean drug tests, that is far from evidence sufficient to show she was addressing her longstanding substance abuse problem. (See, e.g., *In re N.F.* (2021) 68 Cal.App.5th 112, 121 [relatively brief period of sobriety insufficient to show materially changed circumstance where substance abuse problem has repeatedly resisted past treatment]; *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [same].)

Nor does the record show that her counsel could have gathered evidence that mother was addressing her substance abuse problem. Mother had failed to appear for any hearing after the October 4, 2021 hearing. Counsel suggested that mother had said she would be at the February 2, 2022 hearing, but she never appeared, and counsel had no direction from her, suggesting his communication with her was inconsistent. And at no time when the court was detailing why it was finding the bypass provision applied did counsel object to any statement, suggest the court was wrong, or offer evidence to the contrary.

Mother also makes no showing or argument why legal guardianship is not in Emma's best interests. When the legal guardianship was established, Emma was just two years old and, the record suggests, had already spent significant amounts of time out of mother's care and with relatives like her paternal aunt, paternal grandmother, and maternal grandmother. Paternal grandmother, Emma's legal guardian, was trying to ensure that father and Emma maintained a relationship. And Emma was well cared for by paternal grandmother.

Therefore, the error in ordering a legal guardianship under section 360, subdivision (a)(1), was harmless because mother

cannot demonstrate she would have obtained a more favorable result in the absence of the error. To the contrary, had the court set a section 366.26 hearing after denying mother reunification services, *adoption*, not legal guardianship, likely would have been the preferred plan given Emma's young age. (See generally *In re Autumn H.* (1994) 27 Cal.App.4th 567, 574 [adoption and then guardianship are preferred permanency plans].)

C. Mother received notice of the legal guardianship

Mother's final argument why the legal guardianship order should be reversed is she never received notice Emma might be placed in a legal guardianship, pointing out that mother was unhoused at times and had phone problems. Mother thus asserts that DCFS should have noticed her at maternal grandmother's house because mother sometimes was in contact with her.

"[P]arents are entitled to due process notice of juvenile proceedings affecting their interest in custody of their children. [Citation.] And due process requires 'notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " (*In re Melinda J.* (1991) 234 Cal.App.3d 1413, 1418; accord, *In re Jasmine G.* (2005) 127 Cal.App.4th 1109, 1114.)

Here, mother submitted a JV-140 notification of mailing address form on July 8, 2021, the day before the detention hearing, directing all documents and notices be sent to her attorney's office in Monterey Park. The record contains no revocation of that form or indication that the notices thereafter sent to that address were not being received. To the contrary, mother appeared at the October 4, 2021 hearing after receiving notice of that hearing at her attorney's office. At that hearing,

the juvenile court ordered mother to appear for the next hearing on December 13, 2021 without further notice. Even so, notice of the December 13, 2021 hearing was mailed to mother's counsel, and the notice stated that the recommendation was no family reunification services. Finally, notice of the May 16, 2022 disposition hearing was also mailed to mother at her attorney's office, and the notice stated the same recommendation of no family reunification services.

Although mother agreed notices could be sent to her attorney's office, she argues that she did not receive notice of the legal guardianship hearings. Her attorney, however, was at every disposition hearing and objected to the legal guardianship at each one. Indeed, at the February 2, 2022 disposition hearing, counsel said that mother had told him she objected to legal guardianship. At the May 16, 2022 hearing, counsel said mother told him she wanted to be there but had a criminal matter she needed to attend to. The record therefore shows that mother had actual notice of the dependency proceedings, that her reunification services might be terminated, and that a legal guardianship might be established.

II. Visitation

Mother next contends that the court abused its discretion by failing to specify the frequency and duration of visits and by delegating the decision whether visits would occur to paternal grandmother. DCFS concedes, and we agree, that remand for the limited purpose of directing the court to specify the frequency and duration of any visits is appropriate.

When a court orders legal guardianship it shall order visitation with the parents unless visitation would be detrimental to the child's physical or emotional wellbeing. (§ 366.26,

subd. (c)(4)(C).) Visitation orders will not be disturbed on appeal absent an abuse of discretion. (*In re D.P.* (2020) 44 Cal.App.5th 1058, 1070.) A juvenile court abuses its discretion if it delegates the decision whether visitation will occur to a third party, including a guardian, although the juvenile court may delegate responsibility for managing the details of visits, including their time, place, and manner. (*In re Korbin Z.* (2016) 3 Cal.App.5th 511, 516.) When a juvenile court orders visitation, it shall specify the frequency and duration of visits. (*In re Grace C.* (2010) 190 Cal.App.4th 1470, 1478; *In re M.R.* (2005) 132 Cal.App.4th 269, 274.)

Here, the court ordered visits for six hours a week for each parent. At the May 16, 2022 hearing, the court said the visits would be monitored by someone approved by the paternal grandmother, although this proviso was not in the written guardianship order. As mother points out, the trial court did not specify how the six hours were to be distributed over the week; for example, whether the six hours could be on one day or two hours three days a week. To the extent the order therefore would allow paternal grandmother to determine frequency and duration of visits, this amounts to an improper delegation of authority to the guardian. (See, e.g., *In re Rebecca S.* (2010) 181 Cal.App.4th 1310, 1314.)

Remand is therefore necessary for the court to provide a more specific order regarding any visitation with mother.

III. ICWA

Mother and father denied Indian heritage when DCFS interviewed them and again on their ICWA-020 forms. On the basis of these denials, the juvenile court found at the July 9, 2021 detention hearing that it had no reason to know that Emma was

an Indian child, but it noted that DCFS had a continuing duty to ask relatives about Indian heritage and to update the court.

Although mother did not challenge the court's ICWA finding below, on appeal she urges that DCFS breached its duty of inquiry because it did not interview readily available paternal extended family members, namely paternal grandmother, paternal great aunt and paternal aunt, about possible Indian ancestry. She thus urges that the legal guardianship order should be reversed and remanded for compliance with ICWA.

We have no occasion to decide whether the court and DCFS complied with their duties of inquiry under ICWA. Instead, because we are remanding for the court to reconsider its visitation order, we direct the court to order DCFS to conduct a further ICWA inquiry of paternal grandmother, paternal great aunt, and paternal aunt, to report its findings, and to conduct a further ICWA inquiry as appropriate.

DISPOSITION

The visitation order is reversed, and the matter is remanded with the direction to specify the frequency and duration of any visits with mother and to order DCFS conduct a further ICWA inquiry. The order of legal guardianship is otherwise conditionally affirmed subject to compliance with ICWA as described in this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

I concur:

LAVIN, J.

EGERTON, J.